U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2006

BALCA Case No.: 2005-INA-00168
ETA Case No.: 2002-CA-09528457/JS

In the Matter of:

ROSA CHICO'S CARE HOME,
Employer,

on behalf of

DIEGO S. JERVOSO,
Alien.

Appearance: Michael Gurfinkel, Esquire
Glendale, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Caregiver.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on

STATEMENT OF THE CASE

On March 29, 2001, Employer, Rosa Chico's Care Home, filed an application for labor certification to enable the Alien, Diego S. Jervoso, to fill the position of "Caregiver." (AF 100). The job was classified by the Job Service as that of "Nursing Aides, Orderlies & Attendants." The position required four years of high school and three months of experience in the job offered. The position was listed as being 40 hours per week, with the work hours being 5:00 a.m. to 8:00 p.m., with overtime as needed, and the requirement that the employee be on call 24 hours and live-in. The rate of pay was $1,417.83 per month. The job duties included the requirement that the employee wake up at night for toilet needs.

On October 24, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification for several reasons: (1) there were unlawful terms or conditions of employment; (2) an adverse effect on the wages or working conditions of U.S. workers similarly employed; (3) the position did not appear to be open to U.S. workers; and (4) there were contract deficiencies in the contract of employment.[2] (AF 91). The CO noted that the Alien had been in the job since October of 2001, and there was a question as to whether he had been paid wages as required by state and federal laws. If the Alien has not been paid wages, the CO noted that the position could be found to have been not truly open to U.S. workers and that the employment of the Alien under such terms or conditions might have an adverse effect on the wages or working conditions of U.S. workers.

The CO noted that the position required employment from 5:00 a.m. to 8:00 p.m., that the employee be on-call twenty-four hours per day and live-in. While Employer indicated that she would pay compensation for overtime, it was not clear to the CO that Employer understood or paid compensation according to the applicable requirements. It was also not clear if the extra-long fifteen hour shifts plus additional hours on-call were being created for the labor certification

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the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

[2] As that issue was not raised in the Final Determination, it will not be detailed herein.

job, whereas the Alien did not have to work such long hours. Nor was it clear who provided around the clock care and whether that individual was compensated according to California requirements. Additionally, the California Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE"), required that the term "controlled standby" be used to describe the condition in which employees are called to work on-call twenty-four hours per day and that this be compensated at no less than minimum wage.

Employer was directed to submit rebuttal showing the number of staff and hours worked at the home and how Employer determined compensation for overtime hours worked. The CO requested W-2 forms for all workers and an explanation as to how overtime pay, including compensation for time spent on call, was reflected in the amounts paid. If Employer had not been compensating for overtime and controlled standby, Employer was directed to explain how there was no adverse effect. Employer was also advised that, in order to be in compliance with 20 C.F.R. § 656.20(c)(7), Employer needed to amend both the job offer and its re-advertisement to state that the employee must be available on call 24 hours per day and that Employer would compensate in accordance with state law/regulations for controlled standby. Employer also needed to state that it was willing to retest the labor market with the revised requirements.

The CO also questioned whether a current job opening existed with the hours detailed above and the live-in requirement. The application showed that the Alien already lived at the place of employment when the application was submitted March 20, 2001; however, in the ETA 750B, the Alien was listed as being employed at a restaurant for forty hours per week from November 1998 "to present." The application had with it a contract signed by the Alien and Employer, also dated March 20, 2001, which described the requirement that the Alien wake up at night to provide assistance but did not state the hours of work or a start date for employment. Employer had submitted an amendment to the ETA 750B, asserting that the Alien had been in the job for thirty-six hours per week since October 2001, further indicating that he had volunteered in the position from March 1, 1998 through July 1, 1998. Separately, Employer's agent had submitted a statement in July of 2002, describing the labor certification process as a “cure” with respect to “under-the-table” employment. The CO found that while Employer had amended the wage offer and offered overtime pay, it was not clear that the job truly required the

number of hours per week indicated and that the position was truly the same position as the one being offered. The CO questioned how the Alien could be performing the job as stated while also working forty hours per week elsewhere, as shown on the ETA 750B.

Given the reference made to "under-the-table employment," the CO further questioned whether the Alien was an owner or family member and whether the job for a live-in to be on-call 24 hours per day was truly an available position. Finally, if the Alien was paid "under-the-table" and the labor certification process was being referred to as a cure, it appeared that the Employer might be holding the payment of wages contingent on the certification process and if so, the position might not be open to any qualified U.S. worker. If Employer claimed no reported wages, it needed to show how the job was truly open to any qualified U.S. worker. If Employer had not been paying wages comparable to the offered wage, Employer needed to explain how it was truly willing to replace unpaid workers with a worker who required a prevailing wage.

Employer submitted rebuttal which was received on December 1, 2003. (AF 35). Included were numerous documents including a 2002 W-2 statement for the Alien evidencing wages in the amount of $13,000.00 and several Memos signed by the Alien and Employer. In those Memos, it was asserted that none of the employees worked overtime or on-call time and therefore no compensation was made for overtime and on calls. According to the Memo, if an employee needed to work overtime, all such work would be compensated according to employment laws. It was stated that the prevailing wage was $1,417.83 per month, and the Alien was currently working 36 hours per week and receiving wages of $1,083 per month, or around $7.52 per hour, plus free room and board, which was above the minimum wage. Therefore, according to Employer, the employment of the Alien had no adverse effect on the working conditions of U.S. workers. Employer indicated further that it was willing to replace the Alien with a qualified worker, however, none were interested in the job offer. Employer indicated its willingness to retest the labor market and to delete the 24 hours on call requirement, amending the work schedule to 5-9 a.m. and 4-8 p.m., also deleting the requirement that the employee "may wake up at night for toilet needs."

Employer stated that it was owned and operated by Rosa Chico and her husband, with no partners or officers involved, and that the Alien is not related to either and has no interest in the business. Employer asserted it was ready and willing to replace the Alien with a qualified U.S. worker. Employer stated that the Alien was currently working 36 hours per week and did not work overtime or on-call.

With regard to the payment of wages, Employer stated that the Alien was not only receiving the wage set forth above of $1,083 per month, but free room and board ($1,050), rental for a private room ($600), value of utilities ($200), and food and snacks ($250) on a monthly basis as well. According to Employer, if a qualified U.S. worker were found, it would be required to pay the prevailing wage, which is equivalent to what it was currently paying the Alien.

A Final Determination was issued on December 16, 2003. (AF 32). The CO found that Employer failed to overcome the appearance that the job was not truly open to U.S. workers as required by the regulations at 20 C.F.R. § 656.20(c)(8). The CO found that the job offer was for a worker who would be on-call twenty-four hours per day. Employer had previously written the local office in an effort to justify the live-in requirement based on the on-call requirement, and had advertised the position for a live-in worker who was required to be on-call 24 hours per day. The rebuttal information now denied that the work schedule as presented on the application ever existed, with no explanation for the discrepancy between the statements made on the application of labor certification and the statements made in rebuttal regarding overtime and the on-call requirement. The CO found that the Employer had not been paying wages comparable to the wage offer on the application, as the $1,417 per month that the Employer was asked to offer was exclusive of room and board. Employer's argument that room, board, and utilities could combine to make the lesser wage it paid the equivalent to the prevailing wage did not support Employer's stated willingness to pay the prevailing wage.

The CO pointed out that the Employer's reference to unsuccessful recruitment could not support its claim that the job was truly open to U.S. workers because the Employer advertised for

a position that required 24 hour on-call at the time that the recruitment was unsuccessful, yet now indicated that the stated special requirements were not genuine. The CO found that while Employer's rebuttal eliminated the previously stated requirements for overtime and 24 hours on-call, it did not ask to amend the application to provide a new work schedule for review. According to the CO, if the new work schedule information had been disclosed earlier, additional questions might have been required including whether the changed work schedule information could support the live-in requirement.

In reviewing the initial application with the requirements of overtime and on-call availability and the statements made in rebuttal regarding the lack of these same requirements, the CO found Employer's credibility damaged. As Employer had not been paying the prevailing wage and submitted statements in rebuttal suggesting that room and board be considered an equivalent, the CO found that Employer was not willing to pay the prevailing wage to a U.S. worker where the Alien was being paid less. Labor certification was, therefore, denied.

On January 19, 2004, Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("Board"). (AF 1). The CO advised on July 12, 2004, that the Request for Reconsideration had been denied. (AF 31). This matter was then forwarded to the Board for review. The Board docketed the case on June 23, 2005.

DISCUSSION

With its request for review, Employer has submitted new information and documentation. The Board's review of the denial of labor certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Accordingly, the evidence newly submitted by Employer will not be considered.

In its request for review, Employer requests that it be allowed to retest the labor market and re-advertise the position. Employer reiterates its willingness to delete the on-call requirement and to re-advertise the position. This would still leave the live-in requirement in

place, however, which, as the CO points out, raises additional questions regarding the necessity of that requirement. While ordinarily that might give rise to a supplemental NOF being issued, the application, even with the revisions offered by Employer in rebuttal, contains fatal flaws.

Thus, on the finding that the position contained unlawful terms or conditions of employment, Employer rebuts that it has been paying the Alien $1,083.33 per month, arguing that the cost of room and board, if included, would be higher than the prevailing wage of $1,417.83 per month. Employer argues that if a U.S. worker were found, Employer would be obligated to pay the prevailing wage, which according to Employer, is equivalent to the wage currently paid the Alien, when room and board are taken into account. The prevailing wage, however, is exclusive of room and board, which are to be provided as part of the job. This was clear to Employer, as evidenced by the statement previously provided wherein Employer indicated that U.S. workers will be offered free board and lodging in its job offer. (AF 105). As the CO pointed out, Employer has not been paying the Alien wages comparable to the wage offer on the application and Employer's argument regarding this deficiency did not rebut the CO's finding that Employer was not willing to pay the prevailing wage. Therefore, the Employer has not established that this position was truly open to any qualified U.S. worker.

Section 656.20(c)(8) requires that an employer show that the job has been and is clearly open to qualified U.S. workers; that is, that a *bona fide* job opportunity exists. As was stated by the court in *Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987), slip op. at 7:

> Requiring the job opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of §656.20(c)(8). Likewise, requiring that the job opportunity be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment.

In the instant case, the totality of the evidence presented fails to establish that a *bona fide* opportunity exists which is clearly open to qualified U.S. workers. Labor certification was, therefore, properly denied. Consequently, the remaining issue need not be addressed, and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.